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June 4, 2007

219452

BY HAND DELIVERY

The Honorable Vernon A. Williams
Secretary
Surface Transportation Board
Attn: STB Ex Parte No. 669
395 E Street, SW
Washington, D.C. 20423-0001

Re: Ex Parte No. 669, *Interpretation of the Term "Contract" in 49 U.S.C. 10709*

Dear Secretary Williams:

Please find an original and ten (10) copies of the Opening Comments of Entergy Services, Inc. in response to the Board's Notice served on March 29, 2007 in the above-referenced proceeding.

We have enclosed an additional copy of these Opening Comments. Please indicate receipt and filing by time-stamping this copy and returning it with our messenger.

Thank you for your attention to this matter.

Sincerely,

Peter A. Pfohl
An Attorney for Entergy Services, Inc.

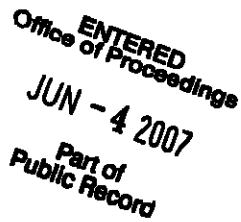
Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

INTERPRETATION OF THE TERM "CONTRACT" IN 49 U.S.C. 10709	)	**EX PARTE NO. 669**

219452

OPENING COMMENTS OF
ENTERGY SERVICES, INC.



ENTERGY SERVICES, INC.

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Dated: June 4, 2007

Attorneys for Entergy Services, Inc.

I. INTRODUCTION

Entergy Services Inc. and the Entergy operating companies (collectively "Entergy"), appreciate this opportunity to address matters relating to the Surface Transportation Board's ("STB's" or "Board's") Notice of Proposed Rulemaking served March 29, 2007 concerning the determination of what constitutes a railroad transportation "contract" under 49 U.S.C. § 10709, particularly in light of the railroads' recent use of public pricing instruments.

Entergy owns and operates 5 coal fired generating units through its operating companies Entergy Arkansas, Inc. and Entergy Gulf States, Inc. These coal units, which total 3,887 MW of capacity, include the White Bluff and Independence Stations in Arkansas, and the Nelson Station in Louisiana. Entergy ships approximately 15 million tons/year of coal from the Powder River Basin ("PRB") of Wyoming to these coal-fired electric generating facilities. All of these units were originally designed to burn, and, with the exception of small test burns of lignite and petcoke, until 2005 did in fact burn, 100 percent PRB coal.

There are only two railroads, the Union Pacific Railroad Company ("UP") and the BNSF Railway Company ("BNSF"), which can originate coal from the mines in the Wyoming PRB from which Entergy receives the majority of its coal. At destination, both of these carriers can serve Entergy's White Bluff plant (UP direct, and BNSF via trackage rights over UP to the White Bluff)[1] and have done

[1] BNSF trackage rights to serve White Bluff were gained as a result of a settlement agreement between Entergy and UP as a result of a multi-year litigation with UP over severe contractual service performance issues that Entergy suffered under the parties' former transportation agreement

so from 2001 through 2006. Obtaining dual carrier service at White Bluff was achieved as a result of an extensive and involved process (including a severe UP service failure and accompanying litigation) which required tremendous effort, persistence, and expense on behalf of Entergy over a number of years. However, there has been an abrupt competitive change in recent years in the marketplace for western coal transportation service and, at contract renewal, BNSF has elected not to effectively compete with UP for a share of the White Bluff coal transportation business.

In contrast to its White Bluff Station, Entergy's Independence Station remains captive to the UP for coal deliveries. This service is provided by UP and the Missouri & Northern Arkansas Railroad ("MNA"), with traffic routed via UP through Little Rock, Arkansas to Diaz Junction, where it is interchanged to MNA for final delivery to the Independence Station. Unfortunately, MNA, a "shortline," is effectively blocked from connecting with other railroads other than UP to enable Independence to receive competitive service for a significant portion of the haul by the terms of a sale/lease agreement imposed by UP when it leased the trackage over which the MNA operates. That agreement, approved by the STB's predecessor, the Interstate Commerce Commission, imposes exorbitant penalty costs on the shortline if it interchanges more than a small percentage of traffic with a UP railroad competitor, and effectively prevents MNA from delivering BNSF-originated coal shipments to Independence in competition with UP. In addition to this financial barrier, the sale/lease agreement also provides a service take back option to UP which, if exercised, would cause the Independence Station to be closed to any other delivery carrier including the MNA.

The Board is well-aware of so-called "paper barriers to interchange," i.e., terms in rail line sales/lease agreements that penalize the buyer/lessor for interchanging traffic with competitors of the seller/lessor, or in some other fashion discourage or prevent such interchanges. Entergy Arkansas is a real-life example of a company competitively harmed by such a paper barrier.[2]

Entergy Gulf States, Inc.'s Nelson Station near Lake Charles, LA, annually burns approximately 2.2 million tons of coal, primarily from the PRB. In the 1997 timeframe, Entergy pursued a build-out option at Nelson Station at a cost of more than $10 million. The sole purpose of this build-out was to stimulate rail competition between BNSF, then serving the plant through Kansas City Southern Railway ("KCS") and UP. However, due to contractual complications, the build-out spur was not used for 2 years. In a rebid of transportation services to Nelson in 1999, BNSF and BNSF/KCS, each delivering approximately 50% of the volume, successfully outbid UP for service to Nelson and delivered coal from 2000 – 2004. BNSF served the Nelson Station over trackage rights obtained from UP.[3] As Entergy sought to rebid transportation services to Nelson in early 2004, UP announced that it would no longer effectively compete for transportation services and UP only supplied its Circular 111 price and terms to Entergy's RFP request. Even today, as Entergy is rebidding the transportation service to Nelson Station, neither

[2] Entergy has participated extensively in the Board proceedings in Ex Parte No 575, Review of Rail Access and Competition Issues, Renewed Petition of the western Coal Traffic League, and it has addressed the issue of railroad paper barriers at length, including in filings dated April 29, 2005, May 16, 2005, March 8, 2006, May 22, 2006 and July 22, 2006

[3] BNSF trackage rights to serve Nelson were gained, in the face of strong opposition by UP, through a combination of orders by the STB during the UP/Southern Pacific merger proceeding in the late 1990s and a post-merger re-arrangement of UP's and BNSF's operations between Houston and New Orleans

railroad is effectively competing or offering reasonable service commitments -- thus de-valuing the benefit of rail build-outs.

Competition is supposed to encourage the investments needed to provide service levels necessary to retain current traffic and attract new traffic, as well as promote efficiencies and innovations, and reduced rates -- not the opposite. As stated, strategies to bring about and support two-carrier competition (e.g., build-outs) may not give a railroad customer relief if railroads refuse to effectively compete. At a very minimum, the western railroads' public pricing actions have de-valued the investments that Entergy has made to introduce and maintain competition and ensure the reliable supply of PRB coal for its electric generating facilities. It is Entergy's belief that these public pricing instruments have helped foster an environment that has produced more erratic and indifferent service by the western railroads that has adversely affected all western coal shippers by not providing service performance measures that promote timely deliveries and efficient service.[4]

II. THE CURRENT STATE OF RAILROAD COMPETITION IN THE MARKETPLACE

The enactment of the Staggers Act of 1980 for the first time allowed railroads and shippers to enter into competitive bid transportation contracts for rail services. Prior to that time, all freight traffic moved under regulated tariff provisions. The Staggers Act was designed to promote rail to rail competition, de-regulate the rail industry and allow

[4] Entergy is currently involved in litigation brought by UP in Arkansas state court in 2006 involving severe contractual service problems Entergy has experienced under the parties' current rail transportation agreement for PRB coal service to White Bluff and Independence

the free marketplace to control pricing and to provide protection to shippers from abusive market power actions from the railroads when competition does not exist.

Through the use of transportation contracts, western coal shippers such as Entergy with more than one railroad service option largely had been able to obtain reasonable rates, acceptable service performance guarantees and appropriate protections in the event of service failures. From the mid-1980s until early 2004, BNSF and UP competed for the right to transport PRB coal tonnages and, as a result, the PRB Joint Line has increased transported tonnage from approximately 75 million tons in 1984 to over 350 million tons in 2006. Over this time period, Entergy was reasonably successful in negotiating its rail transportation service requirements. Entergy has also worked hard to maintain its competitive position. It has spent millions of dollars in plant and transportation facilities and in equipment investments.

However, the marketplace has changed. Railroad mergers and acquisitions since 1980 have reduced the number of Class I railroads to merely seven (7); with the largest four (4) moving 95% of rail traffic. For all practicable purposes, the major four railroads have divided the USA into territories of service with little or no competition between them.

As stated, western coal transportation demand growth has been strong, but that growth has been steady and predicted. Instead of meeting demand, it appears that the railroads have chosen to use pricing as a mechanism to allocate transportation capacity to the detriment of customers. As one UP executive explained in connection with UP's rollout of its Circular 111 public pricing regime:

> With the current demand for transportation far outstripping the available supply, the most effective tool we have to control volume growth on our railroad is price. As such, we are taking pricing actions to bring supply and demand into balance.

Letter to Customers from Jack Koraleski, Executive Vice President – Marketing and Sales of Union Pacific Railroad Company, (dated Apr. 15, 2004).

Both PRB railroads now publish standard pricing documents *i.e.* standardized documents, with volume commitments for up to 3 years in duration, whereas previously longer-term contracts were more common. These pricing documents contain very limited service obligations.

- UP's Circular 111 contains a provision requiring that all shortfall tons have to be mutually agreed upon in writing, and they will have 90 days after the agreement to mitigate the shortfall. If they still fail to deliver the shortfall, the railroad will compensate the shipper with penalty payments in the $3/ton range, or less than $2/MWh of lost generation. *(Keep in mind that $2/MWh is nowhere close to the costs of the required replacement energy or fuel and provides the railroad with no meaningful incentive to meet it service commitment.)*

- BNSF's Pricing Authority 90068 goes further and states: "[u]ntil further notice, service commitments previously offered under this subsection will not be accepted."[5]

Both of these public pricing instruments offer the customer two options. Option 1 contains no tonnage commitment, little to no service commitment from the railroads and a term of one (1) year. For a reduced price compared to Option 1, Option 2 requires the customer to commit to an annual tonnage volume, in return for little to no service commitment from the railroad and a term of three years. Both of these public price documents are offered to the customer under a 'take-it-or-leave-it' condition. The public

[5] Common Carrier Pricing Authority BNSF 90068 (Revision 47, issued 5/7/2007) page 2

pricing instruments also incorporate new fuel surcharges. Price is only one component of a competitive offering. By publishing standard terms, the railroads can effectively communicate the service standards that they are willing to provide to not only to their customers, but also their competition.

The railroads' public pricing actions raise serious competitive concerns about price signaling as well as recurring service lapses brought about by apparent supply/demand imbalances fostered by the railroads actions or inactions. By refusing to negotiate meaningful rates and service terms and publicly expressing their desire and success at raising rates, all shippers are placed in competitive jeopardy. In fact, recently some railroad investors have made public statements requesting that the railroads decrease infrastructure investments with the currently high profits being earned, and instead use these significant profits to buy back stock and increase shareholder dividends.

III. Recommendations

Entergy believes that the STB has an obligation to ensure continued effective rail to rail competition. It is pleased that the Board has been made aware of railroads' pricing behavior. It also shares the Board's "concerns that the increased use of these hybrid pricing mechanisms could create an environment where collusive activities in the form of anti-competitive price signaling could occur." It is Entergy's direct experience that this type of collusive behavior has already taken place to the considerable detriment of the competitive marketplace as discussed earlier in this statement.

Entergy has several concerns about the Board's proposed new definition of contract under its proposed rules. First, the Board's Notice largely appears to fail to recognize the fact that whether or not a contract actually exists is principally an issue for a court to decide, and that the Board's role is very limited. Under the law, the STB clearly has exclusive jurisdiction over the railroad's common carrier rates and services. See 49 U.S.C. § 10501(b) (providing that the Board's jurisdiction over "transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules . . . practices, routes, services, and facilities of such carriers . . . is exclusive"). However, matters involving railroad contracts, and specifically, the STB's authority to determine the existence of a contract, are less clear, and this issue does not appear to have been adequately considered by the Board in its Notice.

Determinations regarding the legality and enforceability of rail transportation contracts are clearly outside the jurisdiction of the Board as these matters are under the province of the courts. See 49 U.S.C. 10709(c) (providing that transportation contracts "shall not be subject to [STB jurisdiction]" and that "[t]he exclusive remedy for any alleged breach of a contract . . . shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree"). Thus, the Board's determination of whether a contract exists must be carefully considered and delineated so as not to overstep 49 U.S.C. § 10709.[6] At a minimum, and to ensure there is no

[6] See e.g., Burlington N. R.R. Co. v. ICC, 679 F.2d 934, 941-42 (D.C. Cir. 1982) ("contract rate disputes are to be aired exclusively in court" and former section 10713(j) "vests in the [Board] largely ministerial responsibilities" over such instruments), Cleveland Cliffs Iron Co. v. ICC, 664 F.2d 568, 591-92 (6th Cir. 1981) ("on its face, section 208 [§ 10709] evinces an unequivocal intention that matters of contract dispute between shipper and carrier are to be decided by courts of law rather than by the [Board]")

misunderstanding, the Board should clarify that its role is narrow, and its rules are intended to be confined to simply determining whether or not it has jurisdiction over a particular pricing instrument, and that it is not attempting to usurp the courts' jurisdiction over rail contracts.

Second, Entergy has concerns about the scope of the Board's proposed definition. The Board's proposal employs a broad test for defining whether a contract exists under 49 U.S.C. § 10709. The proposal defines a contract as "any bilateral agreement . . . in which the carrier agrees to a specific rate for a specific period of time in exchange for consideration from the shipper." As an initial matter, Entergy questions whether such an explicit test is necessary given the Board's limited jurisdiction over matters involving contracts, and the Board's current ability to decide such matters on a case-by-case basis without any need for any changes in its rules.[7]

Entergy has concerns that the proposal appears to be so broad as to possibly subsume a wide variety of pricing instruments that are clearly intended as common carrier tariffs. The very nature of western coal unit train coal movements that have been established over time, regardless of the type of pricing vehicle involved, might be considered to fit under the Board's proposed contract definition. Unit train coal movements often entail a series of mutual exchanges on many essential terms (e.g., train sizes, provision of railcars, annual volume commitments, and unloading), with the involved pricing intertwined with these commitments over specified time periods. These

[7] See Kansas City Power & Light Co. v. Union Pacific R.R. Co., STB Docket No. 42095 (Decision served Mar. 29, 2007) ("KCPL"), Union Pacific R.R. Co. – Petition for Declaratory Order, STB Finance Docket No. 35021 (Decision served May 16, 2007) ("UP Declaratory Decision")

mutual commitments benefit all parties, assist with planning, and promote more efficient transportation.

Third, to the extent that the Board is authorized under its limited jurisdiction to examine the issue, it needs to recognize that a basic tenant of determining contract existence and interpretation matters is to ascertain the intention of the parties as it existed at the time of contracting. See Restatement (Second) of Contracts §202. However, the Board's proposal appears to ignore issues of party intent. Entergy suggests that the Board's proposal should incorporate considerations of the parties' intent See KCPL.

Fourth, the Board's proposed rules should begin to address the harmful competitive nature of hybrid pricing and the unintended effect of making it more difficult for railroad customers to bring maximum reasonable rate cases against market dominant railroads. All appearances are that hybrid pricing vehicles were deliberately crafted by the carriers to allow them maximum flexibility to fend off any review by either the STB or the courts. For example, if the Board determines a particular hybrid pricing instrument is outside of its jurisdiction as a contract, and a court disagrees, then the carriers might succeed in immunizing the pricing from both STB and court challenge, leaving the involved shipper with no avenue of redress. The Board should not allow the railroads to manipulate the process in this manner.

In particular, Entergy submits that the Board's examination of hybrid pricing vehicles should be construed against the drafter, in a manner that fosters enhanced competition and reasonable rate remedies. In this respect, the Board should clarify that a shipper's ability to challenge hybrid pricing through a maximum rate case will be fully

preserved (see KCPL), any contract rate defenses in rate cases involving hybrid pricing will be highly disfavored, and that the Board will not delay rate cases that involve hybrid pricing by deferring to the possible determination in court of the nature of any hybrid pricing.[8]

Entergy appreciates the opportunity to submit these opening comments.

Respectfully submitted,

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[8] Additionally, the Board should clarify that hybrid pricing should not be immune from antitrust challenge under the longstanding filed rate/Keogh doctrine. See Keough v. Chicago and N. W. Ry., 260 U.S. 156 (1922). That doctrine accords antitrust immunity to rail carriers in certain instances, but it should not be available to rail carriers engaged in anticompetitive hybrid pricing practices.